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HAROLD B. WILLEY,

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1955.

No. 673

SQUIRREL BRAND COMPANY,
Petitioner,

vs.

BARNARD NUT CO., INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

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INDEX OF SUBJECT-MATTER.

Page

The Petition for Certiorari..... 1

I. The Questions Presented for Review..... 2

Reasons Relied on for Allowance of the Writ..... 4

II. The Statutes Involved in the Case—The Trade-Mark Act of 1946..... 6

III. Concise Statement of the Case..... 8

a) The District Court Decision..... 11

b) The Court of Appeals Decision..... 12

IV. Argument Amplifying the Reasons Relied on for Allowance of the writ..... 13

1. On the Issue of Trademark Infringement— .. 15

A. The decision of the Court of Appeals is in conflict with the following cases holding that where the question of confusing similarity of two trademarks is based solely on the marks themselves, the Court of Appeals is not bound by the conclusions of the District Court in this respect 15

B. The decision of the Court of Appeals conflicts with the following cases, holding that where the trademarks are identical or closely similar, it is immaterial that the form and dress of label or package is different 15

C. The decision of the Court of Appeals is in conflict with the following cases establishing that trademark infringement is not avoided by a defendant's adding his own name as manufacturer, or by adding descriptive words, such as "NUTTEE FOODS" 16

D. The decision of the Court of Appeals is contrary to the settled rule that picture translations infringe word trademarks.. 18

E. The decision of the Court of Appeals conflicts with the settled rule that a defendant who counterclaims for infringement of its own trademark admits confusing similarity with plaintiff's trademark.... 19

2. As to Validity of the "Squirrel" Trademark— 19

A. The decision of the Court of Appeals in holding Petitioner's SQUIRREL trademarks descriptive of nuts and nut candies, on no evidence whatever, completely ignores the effect and prima facie validity conferred on petitioner's SQUIRREL trademarks by their registration on the Principal Register of the Trade-Mark Act of 1946 [Secs. 7 (b), 33 (a) and 45 (definition of Trade-Mark)] (quoted p. 7) 19

B. The decision of the Court of Appeals herein conflicts with the following decisions relating to allegedly descriptive trademarks 20

V. Conclusion 22

Appendix A 25

Appendix B 35, 37

Appendix C 39

Appendix D 41

Table of Cases.

Armstrong Paint & Varnish Works v. Nu-Enamel Corp., 305 U. S. 315 (1938), 83 L. Ed. 195, at 207 (1938) 17, 21, 22

Barbasol Co. v. Jacobs, 160 F. 2d 336, at 338 (CCA 7, 1947) 20

California Fruit Growers Exchange v. Sunkist Baking Co., 166 F. 2d 971, at 973 (CA 7, 1947)..... 15
California Pierce Dye Works v. Calif. Hand Prints, Inc., 159 F. 2d 871 (CCPA, 1947)..... 18
Coca-Cola Co. v. Koke Co. of America, 254 U. S. 143, at 145, 65 L. Ed. 189, at 192 (1920)..... 21
Coca-Cola Co. v. Nashville Syrup Co., 200 F. 157, at 160 (D. C. D. Tenn., 1912)..... 16
Coca-Cola Co. v. Stevenson, 276 F. 1010 (D. C. S. D. Ill., 1920) 18

Fairbank Co. v. Luckel, King & Cake Soap Co., 102 F. 327, at 331 (CCA 9, 1900)..... 16
Feil v. American Serum Co., 16 F. 2d 88, at 89 (CCA 8, 1926) 20
Fuller v. Huff, 104 F. 141 (CCA 2, 1900)..... 16

General Shoe Corp. v. Rosen, 111 F. 2d 95, at 98 (CCA 4, 1940) 20
Gordon's Dry Gin Co. v. Eddy-Fisher Co., 246 F. 954, at 955-6 (D. C. D. R. I., 1917)..... 19
Grocers Baking Co. v. Sigler, 132 F. 2d 498, at 501 (CCA 6, 1942).....16, 19

Hamilton Brown Shoe Co. v. Wolf Bros. & Co., 240 U. S. 251, 60 L. Ed. 629 (1915)..... 21
Hemmeter Cigar Co. v. Congress Cigar Co., 118 F. 2d 64, at 70-1 (CCA 6, 1941).....17, 20, 21
Hier v. Abrahams, 82 N. Y. 519, at 525 (1880)..... 16

Jelks, O. K. & Sons v. Tom Huston Peanut Co., 52 F. 2d 4 (CCA 5, 1931) 16
Johnson, S. C. & Son, Inc., v. Johnson Products Co., 175 F. 2d 176 (CA 2, 1949) 15, 23

LaTouraine Coffee Co. v. Lorraine Coffee Co., 157 F. 2d 115 (CCA 2, 1946), at pp. 118-9 .....14, 15

Little Tavern Shops v. Davis, 116 F. 2d 903, at 916 (CCA 4, 1916) 17

McCormick & Co., Inc., v. B. Manischewitz Co., 206 F. 2d 744, at 746 (CA 6, 1953) 15, 17
Menendez v. Holt, 128 U. S. 514, at 520-21 (1888) 16
Mershon Co. v. Packmayr, 220 F. 2d 879, at 884, 105 USPQ 4 (CA 9, 1953) 16, 17, 19
Miles Shoes, Inc., v. R. H. Macy & Co., Inc., 199 F. 2d 602, at 603 (CA 2, 1952) 15
Mishawaka Rubber & Woolen Co. v. S. S. Kresge Co., 316 U. S. 203, at 205 (1941) 22

Nashville Syrup Co. v. Coca-Cola Co., 215 F. 527, 530 (CCA 6, 1914) 17
National Lead Co. v. Wolfe, 233 F. 2d 195, 105 USPQ 462, at 469 (CA 9, 1955) 15, 20

Photoplay Publishing Co. v. LaVerne Publishing Co., 269 F. 630, at 731 (CCA 3, 1921) 18

Reardon, W. G. Laboratories v. B. & B. Exterminator, 71 F. 2d 515, at 517 (CA 4, 1934) 20

Sears, Roebuck & Co. v. Johnson, 219 F. 2d 590, at 591 (CA 3, 1955) 15
Steele v. Bulova Watch Co., 344 U. S. 280 (1952) 14
Stuart v. T. Z. Stewart Co., 91 F. 243, 245-6 (CCA 7, 1899) 18

Tillman & Bendel v. Calif. Packing Corp., 63 F. 2d 498, at 508 (CCA 9, 1933) 16

Weiner v. National Tinsel Mfg. Co., 123 F. 2d 96, at 98 (CCA 7, 1941) 20
Whitman, Stephen F. & Son v. Stephen Leeman Products, 27 TMR 801, at 803 (D. C. S. D. N. Y., 1937).. 16

Statutes Cited.

Trade-Mark Act of 1946:
Sec. 7b (15 USC 1057b) 6
Sec. 33a (15 USC 1115a) 6
Sec. 32 (1) 15 USC 1114 (1) 7
Sec. 45 (15 USC 1127) 7
Sec. 22 (15 USC 1072) 8

Textbooks and Legal Articles.

Lunsford, "Trade-Mark Infringement and Confusion of Source: Need for Supreme Court Action," 35 Va. L. R. 214 (1949) 14
Nims on Unfair Competition and Trademarks (4th Ed.), Sec. 221, Rp. 716 et seq. 16
Report of Attorney-General's Committee on the Anti-Trust Laws (p. 259) 23
Restatement of Torts:
Sec. 722 17
Sec. 721 18
Sec. 729 18

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SQUIRREL BRAND COMPANY,
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BARNARD NUT CO., INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Fifth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner Squirrel Brand Company respectfully prays for a Writ of Certiorari directed to the United States Court of Appeals for the Fifth Circuit to review a judgment of that Court affirming a judgment of the United

States District Court for the Southern District of Florida, at Miami, in an action for trademark infringement and unfair competition brought under the trademark laws of the United States (15 U. S. C., Secs. 1051-1127) and at common law, the parties being citizens of different States (Massachusetts and Florida, respectively).

a) The opinion of the Court of Appeals is reported in 224 F. 2d 840, and is printed in Appendix A to this petition. The District Court rendered no opinion, but its findings of fact and conclusions of law are reproduced in the Court of Appeals Opinion, 224 F. 2d, at p. 842, and Appendix A herein.

b) The jurisdiction of this Court is invoked on the following grounds:

(i) The date of the judgment of the Court of Appeals sought to be reviewed is August 9, 1955, entered on the same day;

(ii) A petition for rehearing was denied by the Court of Appeals on October 13, 1955, and the time within which to petition for certiorari was extended by this Court to February 10, 1956, by an order signed by Mr. Justice Black on January 11, 1956;

(iii) The statutory provision conferring jurisdiction on this Court to review the judgment in question is Title 28, U. S. C., Sec. 1254.

I. THE QUESTIONS PRESENTED FOR REVIEW.

1. Whether in a suit for infringement of trademarks registered on the Principal Register of the Trade-Mark Act of 1946, comprising the picture of a squirrel and the word "Squirrel" used on nuts and nut candies, and the defendant's trademark is a practically identical picture

of a squirrel also used on nuts, the plaintiff's trademark can nevertheless be denied the substantive rights and remedies provided by the Act (Title 15, U. S. C., Secs. 1051-1127), including protection against colorable imitation, by a finding that the color make-up of the labels on which the plaintiff's and defendant's *trademarks* are used are not similar.

2. Whether in a suit for infringement of a trademark registered on the Principal Register of the Trade-Mark Act of 1946, comprising the picture of a squirrel and the word "Squirrel" used on nuts and nut candies, and the defendant's trademark is a practically identical picture of a squirrel also used on nuts, the plaintiff's trademark can nevertheless be denied the substantive rights and remedies provided by the Act (Title 15, U. S. C., Secs. 1051-1127) including protection against colorable imitation because defendant places its own name on its labels and wrappers, and adds the descriptive phrase "NUTTEE FOODS."

3. Whether in a suit for infringement of a trademark registered on the Principal Register of the Trade Mark Act of 1946 comprising *the word "Squirrel"* used on nuts, nut products and candies can be held not infringed by defendant's trademark comprising *the picture of a squirrel* also used on nuts.

4. Whether in a suit for infringement of a trademark registered on the Principal Register of the Trade-Mark Act of 1946, when the question of confusing similarity and likelihood of confusion between plaintiff's and defendant's trademarks is based solely on the trademarks themselves, and can be determined by visual comparison of the trademarks, the Court of Appeals is bound by *a conclusion of law* of the District Court that plaintiff's and defendant's trademarks are not confusingly similar, and that there is no likelihood of confusion.

5. Can a trademark used for 60 years by the plaintiff and its predecessors and registered on the Principal Register of the Trade-Mark Act of 1946 and accorded the valuable substantive rights provided by the Act, including prima facie evidence of validity of the registration, of registrant's ownership of the mark, and of registrant's exclusive right to use the mark in commerce in connection with the goods specified (Sec. 7b) with the burden of overcoming the prima facie effect of a registration and of proving any defense against the registration placed on the defendant (Sec. 39a), nevertheless be held invalid by a Court of Appeals in an infringement suit on such registered trademark as descriptive of the goods, with no evidence to support the finding, and no opportunity to the plaintiff to prove that in any event its trademark has acquired a secondary meeting indicating its goods.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. The decision of the Court of Appeals ignores the rights granted to registrants of trademarks under the Trademark Act of 1946 (Title 15, U. S. C. 1051-1127) and for recovery for unfair competition.

2. The Court of Appeals failed to apply the Trademark Act of 1946 (Title 15, U. S. C. 1051-1127) to the issues of this case or even to consider that law. Petitioner contends that the Court's decision is directly contrary to applicable decisions on trademarks and unfair competition decided both by this Court and by the Courts of Appeals of other circuits, as hereinafter specified.

3. Because of the nature of the issues and because of the failure of the District Court and the Court of Appeals to consider the Trademark Act of 1946, which is directly involved herein, this case involves an important question of

Federal Law which has not been, but should be, passed on by this Court and establishes a precedent which, if followed, is bound to have an important and damaging effect on trademark rights and business morality generally.

The basic error of the decisions of the District Court and Court of Appeals herein is that they completely ignore the provisions of the Trade-Mark Act of 1946 (Title 15, USC, Secs. 1051-1127; better known as the Lanham Act), and the effect of a registration on the Principal Register of that Act. It was the intent and purpose of the Trade-Mark Act of 1946 to prevent further decisions like those of the Courts below in this case, by providing effective protection against colorable imitation of the trademark registered, and valuable substantive rights, such as prima facie validity of the trademark registered, of registrant's ownership of the mark and his exclusive right to use the mark in commerce on the goods specified, and constructive notice of the registrant's claim of ownership of his mark, and particularly against defendants, who like the defendant here, allege use of the mark *solely within the confines of a single State. Here the trademark is the same and the goods are the same, and the defendant counterclaimed for infringement of its own trademark in Florida, yet the Courts below held the plaintiff's widely known trademark not infringed, but even invalid after 60 years continuous use!* The decision of the Court of Appeals herein has been characterized by trademark experts as the worst decision by a Federal Court in a trademark case in many years. Certainly the decisions of the Courts below as precedents completely emasculate the Trade-Mark Act of 1946, and render it useless for the protection of Federally registered trademarks. The intent and purpose of Congress to provide such effective protection against infringement is nullified.

The only conclusion petitioner can draw from the undisputed facts of record in this case is that the District Court

at Miami and the Court of Appeals will not enforce the Trade-Mark Laws of the United States in a suit by a foreign plaintiff against a local defendant.

To aid this Court in perceiving the issues presented by this case, petitioner reproduces its two trademark registrations (Appendix B to this petition), two labels showing the SQUIRREL trademarks as used by both plaintiff and defendant (Appendix C), and a photograph showing plaintiff's and defendant's jars of nuts side by side (Appendix D). **We respectfully ask this Court whether any trademark can more closely satisfy the statutory language of "colorable imitation of any registered mark" of Sec. 32 (1) of the Trade-Mark Act of 1946 than respondent's trademark here.**

II. THE STATUTES INVOLVED IN THE CASE— THE TRADE-MARK ACT OF 1946.

The case involves the following Sections of the Trade-Mark Act of 1946:

Sec. 7b (15 USC 1057b):

> "A certificate of registration of a mark upon the principal register provided by this Act *shall be prima facie evidence of the validity of the registration, registrant's ownership of the mark, and of registrant's exclusive right to use the mark in commerce in connection with the goods or services specified in the certificate,** subject to any conditions and limitations stated therein."

Sec. 33a (15 USC 1115a):

> "Any certificate of registration issued under the Act of March 3, 1881, or the Act of February 20, 1905, or

* Italics ours throughout this Petition.

of a mark registered on the principal register provided by this Act and owned by a party to an action shall be admissible in evidence and *shall be prima facie evidence of registrant's exclusive right to use the registered mark in commerce on the goods or services specified* in the certificate subject to any conditions or limitations stated therein . . . (15 USC 1115a)."

Sec. 32 (1) (15 USC 1114 (1)):

"Any person who shall, in commerce, (a) use, without the consent of the registrant, any reproduction, counterfeit, copy, or colorable imitation of any registered mark in connection with the sale, offering for sale, or advertising of any goods or services on or in connection with which such use is likely to cause confusion or mistake or to deceive purchasers as to the source of origin of such goods or services; or (b) reproduce, counterfeit, copy, or colorably imitate any such mark and apply such reproduction, counterfeit, copy or colorable imitation to labels, signs, prints, packages, wrappers, receptacles, or advertisements intended to be used upon or in connection with the sale in commerce of such goods or services, shall be liable to a civil action by the registrant for any or all of the remedies hereinafter provided . . ."

Sec. 45 (15 USC 1127):

"Trade-mark. The term 'trade-mark' includes any *word, name, symbol, or device* or any combination thereof adopted and used by a manufacturer or merchant to identify his goods and distinguish them from those manufactured or sold by others."

"Colorable imitation. The term 'colorable imitation' includes any mark which so resembles a registered mark as to be likely to cause confusion or mistake or to deceive purchasers."

Sec. 22 (15 USC 1072):

> "Registration of a mark on the principal register provided by this Act or under the Act of March 3, 1881, or the Act of February 20, 1905, *shall be constructive notice of the registrant's claim of ownership thereof.*"

Plaintiff's 1905 Act Registrations republished under the 1946 Act thus have the effect of *constructive notice* since the effective date of the 1946 Act, July 5, 1947.

III. CONCISE STATEMENT OF THE CASE.

Petitioner, Squirrel Brand Company, a Massachusetts corporation resident at Cambridge, Massachusetts, brought this action against respondent, Barnard Nut Co., Inc., a Florida corporation, resident at Miami, Florida, to enjoin infringement of its well-known SQUIRREL trademark used by petitioner on its nuts and nut candies by respondent's use *of the same trademark on the same goods,* i. e., nuts, and for unfair competition. Jurisdiction of the Federal Court was based on the Trademark Laws of the United States (15 USC, Secs. 1051-1127) and the diversity of citizenship of the parties. Petitioner's SQUIRREL trademark, as registered, comprises both the picture of a Squirrel and the word SQUIRREL. Petitioner and its predecessors have used this SQUIRREL trademark over 60 years, and it is one of the two most widely known trademarks used in the nut and nut candy business in the United States. Both SQUIRREL marks have been registered under the Trade-Mark Act of 1905 and republished under the Trade-Mark Act of 1946—the word SQUIRREL in Reg. No. 76,187, registered December 21, 1909, and the picture of the squirrel in Reg. No. 318,545, registered October 30, 1934—[reproduced herein, Appendix B (Plf's. Exh. 52A and B)].

Respondent Barnard Nut Co., Inc., a local processor of nuts in Miami, Florida, uses an almost identical picture of a squirrel as its trademark for its own nuts—a mirror copy of petitioner's registered picture trademark. See Appendix B, C and D herein.

But apart from this, *respondent's picture of a squirrel trademark clearly infringes petitioner's word "Squirrel" trademark*—under the well-settled rule of picture translation of verbal trademarks. Hence picture marks infringe word marks, and vice versa!

In addition, petitioner charged unfair competition in the obvious similarity of respondent's picture of a squirrel trademark with petitioner's corporate name *Squirrel Brand Company.* Such unfair competition is made actionable by Sec. 43a of the Trade-Mark Act of 1946 and the Federal Court had jurisdiction of it as a Related Claim under Title 28 USC, Sec. 1338 (b), as well as for diversity of citizenship of the parties.

Unfair competition, through the use of similar labels and colors of labels, was not involved in the case—because petitioner sells a wide line of nuts and nut candies using a great variety of labels and wrappers *having a great many different color combinations.*

The one common feature in all of petitioner's labels and wrappers is the picture of the squirrel and the word SQUIRREL trademarks, both prominently displayed, as shown in Petitioner's registrations. Petitioner's slogan on its packages and posters constantly proclaims to its customers: **"Look for the SQUIRREL and get the best"** (Rpp. 229 and 674-5).

Petitioner has sold its products nationally since 1925, and in 1952 sold 136,000,000 individually wrapped or packaged items, 9,000,000 cellophane bags, 516,000 jars and

97,000 cans of nuts—each bearing petitioner's SQUIRREL trademark (Rp. 234). Petitioner showed that its nuts and nut candies are identified in the nut and candy trade and the public mind by the name SQUIRREL—evidenced by a large number of orders from its customers, many of them large chain stores, railroad concessionaires, and the Army and Navy, which called for petitioner's products by the name "Squirrel", such as "Squirrel Brand Peanuts" (Rpp. 246-281 and 649-660), and thus established secondary meaning of the SQUIRREL trademark as meaning the petitioner's goods. The petitioner widely advertises its nuts and nut candies by large displays and posters distributed to its retailers, by advertising in trade magazines, in daily newspapers, on the radio, and in premium offers to the consuming public. Petitioner sells its goods through 2500 wholesale jobbers, who in turn distribute to their own retails accounts, and for this purpose petitioner employs 32 salesmen, two of whom cover Georgia and Florida (Rpp. 236-240). The District Court found (Finding No. 9) that petitioner "has expended large sums in advertising its products under such (Squirrel) trademark or marks" (Appendix A herein).

Respondent Barnard Nut Co. Inc. counterclaimed for infringement of its picture of a squirrel trademark and sought an injunction against petitioner's use of the mark in Florida—claiming priority of use of the trademark on nuts in Florida—*respondent thereby conceded the validity of the SQUIRREL trademark as used on nuts and the confusing similarity of petitioner's and respondent's SQUIRREL trademarks!* In addition, respondent had registered its SQUIRREL trademark in the State of Florida (Rpp. 908-9) and is seeking registration of the same mark in the U. S. Patent Office under the Trade-Mark Act of 1946 (Rpp. 914-5). Both parties thus agreed that the SQUIRREL trademark as used on nuts was valid, and that petitioner's and respondent's trademarks were confusingly similar.

The only defense in the District Court was defendant's alleged priority of use of the SQUIRREL trademark in Florida to which the major part of the trial was devoted. This defense, or the evidence concerning it, is not involved in this Petition, because it was so conclusively shown in petitioner's brief on appeal that there was no connection, *as a matter of law,* between the Capitol Nut Shop in Miami, the alleged prior user, and *this respondent, that respondent dropped the defense entirely on the appeal!*

a) **The District Court Decision.**

The District Court at the close of the trial rendered its decision without briefs by entering Findings and Conclusions that petitioner's and respondent's *labels* were not confusingly similar, and that there would be no likelihood of confusion or mistake as to the source of origin of the goods because the names of petitioner and respondent appeared on each label and container as producer, the *color make-ups* of the labels were not similar, and in addition respondent's labels bore the words "NUTTEE FOODS" and hence there was no "infringement of trademark"—Findings Nos. 13-19, Conclusions Nos. 1 and 2 (Appendix A). Respondent's counterclaim was dismissed for the same reasons—Conclusions Nos. 3 and 4 (Appendix A).

The District Court also found that *the respondent* had used the SQUIRREL trademark in Florida since 1934, and petitioner since 1935 (Findings Nos. 11 and 12) (Appendix A).

The District Court made no finding that respondent's picture of a squirrel trademark was not confusingly similar to petitioner's picture of a squirrel and word "Squirrel" trademarks, as registered under the 1946 Act which was the sole issue before the Court in the trademark infringement suit. Further, the District Court made no

finding as to the *validity* of petitioner's or respondent's SQUIRREL trademarks. Their validity was conceded by both parties.

The final decree dismissed both the complaint, and cross-complaint.

Petitioner appealed. On the appeal *respondent, realizing that the defense of alleged prior use of the Squirrel trademark in Florida was completely untenable, as a matter of law, despite the finding of fact of the District Court, dropped the defense entirely and now asserted the defense that petitioner's (and its own) SQUIRREL trademarks were invalid as descriptive, because "squirrels are naturally associated with nuts"* (and presumably nut candies!).

b) The Court of Appeals Decision.

The Court of Appeals affirmed the decree of the District Court on the ground that the findings of fact of the District Court were not "clearly erroneous" (under Rule 52a) and that it was bound by the findings of the District Court.

But the Court of Appeals went further, and with no evidence whatever and no finding by the District Court, upheld respondent's defense that the figure of a squirrel was descriptive of nuts, nut candies and the nut business In so holding the Court of Appeals gave no consideration to the possibility that petitioner's SQUIRREL trademarks, even if conceivably once descriptive, had acquired a secondary meaning identifying petitioner's products— through 60 years of continued use, national sales for 30 years, and wide advertising. Petitioner's SQUIRREL trademarks are thus held invalid on no evidence whatever, and in a case in which the defendant itself conceded their validity when it thought it had priority in Florida!

But we ask the Court to note that on the questions of similarity of petitioner's *registered SQUIRREL trademarks*, and respondent's picture of a squirrel trademark, and of validity of petitioner's registered trademarks, the *District Court made no findings whatever!*

A petition for rehearing pointing out the errors of the Court of Appeals decision was denied without opinion.

IV. ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

Petitioner seeks review on writ of certiorari herein, because the decision of the Court of Appeals herein is contrary to the express provisions of the Trade-Mark Act of 1946, contrary to the settled rules of Trademark law established by this Court and other Courts of Appeals, and confiscates and destroys without due process of law petitioner's valuable property rights in its SQUIRREL trademarks, built up by 60 years of continuous use, widespread advertising, honorable business practices and reputation for highest quality of product to identify petitioner's goods in the public mind. The decision of the Court of Appeals herein places a premium on commercial piracy, and renders the trademark laws of the United States meaningless and useless. The decision of the Court of Appeals herein clearly shows that that Court will not protect a nationally known and registered trademark, nor enforce the Trade-Mark laws of the United States, in a suit against a local user. Certainly, a trademark, used for 60 years continuously, and in a nationwide business, and registered on the Principal Register of the Trade-Mark Act of 1946 is entitled to at least *the minimum protection of an injunction* against copying by a mark so closely similar—*even against a local user.* As Judge

Clark said in *La Touraine Coffee Co. v. Lorraine Coffee Co.*, 157 F. 2d 115 (CCA 2, 1946), at pp. 118-119:

> "Be that as it may, Congress has shown its continued interest in trade-mark protection by the comprehensive new codification of trade-mark law embodied in the Trade Mark Act of July 5, 1946, which not merely amplified the Act of 1905, 15 U. S. C. A. Sec. 81 et seq., but gave to this property right a legislative standing it had not had before. Derenberg, Trade-Marks Ante Portas, 52 Yale L. J. 829, 830. We should hesitate to go against so clearly expressed a legislative intent for only some remote fears of our own of social disaster to result from grant of the statutory protection. The new statute affords relief for a 'colorable imitation' where use is 'likely to cause confusion or mistake or to deceive purchasers as to the source of origin of such goods,' Sec. 32 (1) (a). Act of July 5, 1946; and all the courts and judges hearing the Mishawaka case were agreed *as to the need of at least injunctive relief to avoid confusion.*"

This Court has not yet passed upon the Trade-Mark Act of 1946, and the effect of registration thereunder. In *Steele v. Bulova Watch Co.*, 344 U. S. 280 (1952), this Court (p. 285) referred to "this complex and controversial Act" and, to the "broad jurisdictional powers" conferred on the Federal Courts as to infringement under Sec. 32 (1) (pp. 283-4). And the lower Courts and legal writers have frequently urged the necessity of final review by this Court of the likelihood of confusion test of trademark infringement presented by the Trade-Mark Act of 1946. See:

> Lunsford, "Trade-Mark Infringement and Confusion of Source: Need for Supreme Court Action," 35 Virginia L. R. 214 (1949):

and the dissenting opinion of Judge Clark in *S. C. Johnson & Son, Inc., v. Johnson Products Company*, 175 F. 2d 176 at 181-2 (CA 2, 1949), wherein he deplored the failure of the majority of the Court to give effect to the broadened protection of the new Trade-Mark Act of 1946.

The case involves basic and elementary principles of trademark law established by this Court and other Courts of Appeals which must guide the Courts if the trademark laws of the United States are to be enforced.

1. **On the Issue of Trademark Infringement—**

A. **The decision of the Court of Appeals conflicts with the following cases holding that where the question of confusing similarity of two trademarks is based solely on the marks themselves, the Court of Appeals is not bound by the conclusions of the District Court in this respect, and reversed the District Court.**

Sears, Roebuck & Co. v. Johnson, 219 F. 2d 590, at 591, (CA 3, 1955);

La Touraine Coffee Co. v. Lorraine Coffee Co., 157 F. 2d 115, at 117 (CA 2, 1946);

Miles Shoes Inc. v. R. H. Macy & Co. Inc., 199 F. 2d 602, at 602-3 (CA 2, 1952);

National Lead Co. v. Wolfe, 223 F. 2d 195, at 204 (CA 9, 1955);

California Fruit Growers Exchange v. Sunkist Baking Co., 166 F. 2d 971, at 973 (CCA 7, 1947);

McCormick & Co. Inc. v. B. Manischwitz Co., 206 F. 2nd 744, at 746 (CA 6, 1953).

B. **The decision of the Court of Appeals conflicts with the following cases, holding that where the trademarks are**

identical or closely similar, it is immaterial that the form and dress of label or package is different:

Grocers Baking Co. v. Sigler, 132 F. 2d 498, at 501 (CCA 6, 1942);

Mershon Company v. Packmayr, 220 F. 2d 879, at 884 (CA 9, 1955);

Fairbank Co. v. Luckel, King & Cake Soap Co., 102 F. 327, at 331 (CCA 9, 1900);

Fuller v. Huff, 104 F. 141 (CCA 2, 1900);

Coca-Cola Co. v. Nashville Syrup Co., 200 F. 157, at 160 (D. C. D. Tenn., 1912), aff. 215 F. 527 (CCA 6, 1914);

Stephen F. Whitman & Son v. Stephen Leeman Products, 27 T. M. R. 801, at 803 (D. C. S. D. N. Y., 1937);

Hier v. Abrahams, 82 N. Y. 519, at 525 (1880);

Nims on Unfair Competition and Trade-Marks (4th Ed.), Sec. 221, Rp. 716 et seq.

The reason is, of course, that the trademark identifies the goods—not details of labels, particularly where dozens of different labels are used. In this case, petitioner's slogan is: *"Look for the Squirrel and get the best!"*

C. **The decision of the Court of Appeals conflicts with the following cases establishing that trademark infringement is not avoided by a defendant's adding his own name as manufacturer, or by adding descriptive words, such as "NUTTEE FOODS."**

Menendez v. Holt, 128 U. S. 514 at 520-521 (1888)—"La Favorita by S. O. Ryder";

O. K. Jelks & Son v. Tom Huston Peanut Co., 52 F. 2d 4 (C. C. A. 5, 1931);

Tillman & Bendel v. Calif. Packing Corp., 63 F. (2d) 498 at 508 (C. C. A. 9, 1933)—Tillman & Bendel's Del Monte Coffee;

Little Tavern Shops v. Davis, 116 F. 2d 903 at 916 (C. C. A. 4, 1916)—"Hubbard's Little Tavern";
Hemmeter Cigar Co. v. Congress Cigar Co., 118 F. 2d 64 at 70-71 (C. C. A. 6, 1941)—"Fortuna's Champs";
Nashville Syrup Co. v. Coca-Cola Co., 215 F. 527, 530 (C. C. A. 6, 1914)—"Fletcher's Coca Cola";
McCormick & Co. v. B. Manischewitz Co., 206 F. 2d 744 (C. A. 6, 1953);
Mershon Co. v. Packmayr, 220 F. 2d 879 at 880 (C. A. 9, 1955);
Restatement of Torts, Sec. 722.

The reason is, of course, that the average purchaser is ignorant of the name and address of the manufacturer of goods. *He identifies the goods by its trademark.*

Similarly as to adding descriptive words, such as "NUTTEE FOODS," the Trade-Mark Act of 1946 expressly excludes descriptive words from registration as trademarks. Sec. 2 (e) provides that a mark is not registerable if it:

> "(e) Consists of a mark which (1) when applied to the goods of the applicant *is merely descriptive or deceptively misdescriptive of them,* or (2) when applied to the goods of the applicant is primarily geographically descriptive or deceptively misdescriptive of them, except as indications of regional origin may be registrable under section 4 hereof, or (3) *is primarily merely a surname.*" (Emphasis added.)

Thus (e, 1) precludes registration of "NUTTEE FOODS," and (e, 3) of "BARNARDS"—the very differences by which respondent's picture of a squirrel trademark are distinguished!

Armstrong Paint & Varnish Works v. Nu-Enamel Corp., 305 U. S. 315 (1938)—"Nu-Enamel"—"Nu-Beauty Enamel";

California Pierce Dye Works v. California Hand Prints, Inc., 159 F. 2d 871 (CCPA, 1947)—"California" not distinguished by "Hand Prints";

Coca-Cola Co. v. Stevenson, 276 F. 1010 (D. C. S. D. Ill. 1920), "Coca-Cola" not distinguished by "A Genuine Coca and Cola Flavor";

Photoplay Publishing Co. v. LaVerne Publishing Co., 269 F. 630 at 731 (CCA 3, 1921), "Photo-Play Journal" not distinguished from "Photoplay Magazine";

Stuart v. T. Z. Stewart Co., 91 F. 243, 245-6 (CCA 7, 1899), "Stuart's Dyspepsia Tablets" not distinguished by "Dr. Stewart's Dyspepsia Tablets";

Restatement of Torts, Secs. 721 and 722.

D. **The decision of the Court of Appeals is contrary to the settled rule that picture translations infringe word trademarks.**

The Restatement of Torts, Sec. 729, lists the factors to be considered in determining confusing similarity, and includes:

> "(iii) verbal translation of the pictures or designs involved;"

The Comment on Clause (a) (p. 594) states:

> "d. Verbal translation of pictures. When the trademark is a design or picture and the designation in question is a word, or vice versa, the similarity between the word and the verbal translation of the design or picture is to be considered. Thus a designation consisting of a picture of a camel might lead to confusion with the trade-mark 'Camel' as readily as might the word 'Kamil.'"

See:

Mershon Company v. Packmayr, 220 F. 2d 879, and cases cited therein at p. 884 (C. A. 9, 1955);
Gordon's Dry Gin Co. v. Eddy-Fisher Co., 246 F. 954, at 955-6 (D. C. D. R. I., 1917).

Thus respondent's picture of a squirrel trademark clearly infringes petitioner's word "Squirrel" trademark—a point entirely overlooked by the District Court and Court of Appeals.

E. The decision of the Court of Appeals conflicts with the settled rule that a defendant who counterclaims for infringement of its own trademark admits confusing similarity with plaintiff's trademark.

Grocers Baking Co. v. Sigler, 132 F. 2d 498, at 501 (CCA 6, 1942).

2. **As to Validity of the "Squirrel" Trademark.**

A. The decision of the Court of Appeals in holding Petitioner's SQUIRREL trademarks descriptive of nuts and nut candies, on no evidence whatever, completely ignores the effect and prima facie validity conferred on Petitioner's SQUIRREL trademarks by their registration on the Principal Register of the Trade-Mark Act of 1946 [Sec. 7 (b), 33 (a), and 45 (definition of Trade-Mark) (quoted p. 7)].

Petitioner's SQUIRREL trademarks were originally registered under the Trade-Mark Act of 1905. Sec. 5, which expressly forbade registration of *descriptive marks*, reads:

> "That no mark by which the goods of the owner of the mark may be distinguished from other goods of the same class shall be refused registration as a trademark on account of the nature of such mark unless such mark—

"(b) . . . provided that no mark which consists, . . . merely in words or devices which are descriptive of the goods with which they are used, or of the character or quality of such goods, or merely a geographical name or term, shall be registered under the terms of this Act."

This registration by the Patent Office is thus an administrative ruling that these marks are valid and not descriptive. The Court of Appeals decision conflicts with the following cases:

Weiner v. National Tinsel Mfg. Co., 123 F. 2d 96, at 98 (CCA 7, 1941);

Barbasol Co. v. Jacobs, 160 F. 2d 336, at 338 (CCA 7, 1947);

Hemmeter Cigar Co. v. Congress Cigar Co., 118 F. 2d 64, at 68 (CCA 6, 1941);

W. G. Reardon Laboratories v. B. & B. Exterminator, 71 F. 2d 515, at 517 (CA 4, 1934);

Feil v. American Serum Co., 16 F. 2d 88, at 89 (CCA 8, 1926).

B. **The decision of the Court of Appeals herein conflicts with the following decisions relating to allegedly descriptive trademarks.**

Barbasol Co. v. Jacobs, 160 F. 2d 336 at 339 (C. A. 7) —Striped barberpole design for shaving cream;

W. G. Reardon Laboratories v. B. & B. Exterminators, 71 F. 2d 515 at 517 (C. C. A. 4, 1934)—Mouse Seed for poisoned grain for mice;

General Shoe Corp. v. Rosen, 111 F. 2d 95 at 98 (C. C. A. 4, 1940) (Friendly for Men's Shoes);

National Lead Co. v. Wolfe, 223 F. 2d 195 at 200 (C. A. 9, 1955), "Dutch Boy" for paint;

Hemmeter Cigar Co. v. Congress Cigar Co., 118 F. 2d 64 at 68 (C. C. A. 6, 1941)—Champions for cigars;

Hamilton Brown Shoe Co. v. Wolf Bros. & Co., 240 U. S. 251, 60 L. Ed. 629 (1915)—"American Girl" for women's shoes.

The Court of Appeals decision completely ignored the fact and the possibility (and the evidence herein supporting it) that petitioner's SQUIRREL trademarks, even if once descriptive, had acquired a secondary meaning in the minds of its customers as indicating petitioner's nuts and nut candies.

As Mr. Justice Holmes said in *Coca-Cola Company v. Koke Company of America*, 254 U. S. 143 at 145, 65 L. Ed. 189 at 192 (1920):

> "Whatever may have been its original weakness, the mark for years has acquired a secondary significance, and has indicated the plaintiff's product alone."

See also:

Armstrong Paint & Varnish Works v. Nu-Enamel Corp., 305 U. S. 315 at 335, 83 L. Ed. 195 at 207 (1938);

Hemmeter Cigar Co. v. Congress Cigar Co., 118 F. 2d 64 at 69 (C. C. A. 6, 1941)—Champions for cigars.

The Court of Appeals further ignored:

1) that respondent itself is seeking registration of its own Squirrel trademark on the Principal Register of the Trade-Mark Act of 1946.

2) that respondent had registered its own Squirrel trademark in Florida and counterclaimed for infringement of it in Florida.

3) that neither petitioner nor respondent is using its Squirrel trademark on *canned squirrel meat*, nor is selling its nuts or nut candies *for consumption by squirrels.*

V. CONCLUSION.

The decision of the Court of Appeals herein casts grave doubt on the validity of every *animal trademark* used in the United States, of which there are thousands,—however widely advertised, well known, and long used, and including such famous trademarks as "Camel" for cigarettes, "Greyhound" for bus service, "Lion" and "Eagle" Brand condensed milk, "White Horse" Scotch Whiskey, and the like. The decision ignores the express language of the Trade-Mark Act of 1946, Sec. 45, that a trademark can be "any word, name, symbol, or device or any combination thereof adopted and used by a manufacturer or merchant to identify the goods and distinguish them from those manufactured or sold by others."

More tragically, the decision completely emasculates the Trade-Mark Act of 1946 as an effective instrument for the protection of trademarks and renders it worthless. The labors, and efforts of Trademark experts for 40 years to produce an effective Trade-Mark Act are wasted if the substantive provisions of the Act and the settled rules of Trade-Mark law embodied therein can be ignored, as they were by the Courts below in this case.

The only rational explanation of the Court of Appeals decision is that somehow the Court thought the Squirrel trademark was being "made the subject of monopoly" (Appendix A). But trademarks are infinite in variety and number and there are thousands of nut processors in the United States using as many different trademarks. This Court has certainly tried to make it clear that a trademark is not a monopoly but is merely private property,* entitled

* Mr. Justice Frankfurter in *Mishawaka Rubber & Woolen Co. v. S. S. Kresge Co.*, 316 U. S. 203, at 205 (1941); Mr. Justice Reed in *Armstrong Paint & Varnish Works v. Nu-Enamel Corporation*, 305 U. S. 315, at 335-6, 83 L. Ed. 195, at 207 (1938); and see the

to protection because adopted and used to identify one man's business and products, and to prevent confusion of the public.

Certainly the Report of the Attorney-General's Committee on the Anti-Trust Laws removes any further doubt on the point (p. 259):

> "Trade-Mark rights in the United States, unlike patents or statutory copyright, are not the outgrowth of a statutory monopoly expressly sanctioned by Constitutional provision. Rather they find their basic legal protection in the common law doctrine of priority of adoption and use and in the public interest in preventing confusion of purchasers. The federal registration statutes, including the Trade-Mark Act of 1946 (Lanham Act), merely serve to strengthen these common law rights. These provisions give the owner of a registered trademark certain procedural and substantive safeguards for more effective protection against infringement or unfair competition."

If the Court of Appeals believes a trademark should not be protected because it is a monopoly, we submit that it cannot ignore the decisions of this Court and refuse to enforce the Trade-Mark Laws of the United States and thus set aside the Congressional mandate. Whatever the reason, the Court of Appeals herein has clearly nullified the trade mark laws of the United States. But the resulting loss to this petitioner is tragic. Its valuable SQUIRREL trademark and the good will associated therewith, built up by 60 years of hard work, business integrity and large in-

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dissenting opinion of Judge Clark in *S. C. Johnson & Son v. Johnson*, 175 F. 2d 176, at 182-3 (C. A. 2, 1949):

> "This is not a monopoly of a natural product or of an invention, but of a name or mark built up by judicious advertising. The question is insistently asked why in that case it is necessary to permit another to reap the rewards of the diligence and money expended by the original exploiter."

vestment, and by which its goods have become identified in the public mind, is destroyed and given to the local defendant to plunder as it pleases.

We respectfully submit that this petition for writ of certiorari should be granted for the reasons stated.

Respectfully submitted,

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APPENDIX A.

In the
UNITED STATES COURT OF APPEALS
For the Fifth Circuit.

No. 15264.

Squirrel Brand Company,
Appellant,

versus

Barnard Nut Co., Inc.,
Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(August 9, 1955.)

Before Rives and Cameron, Circuit Judges, and Dawkins, District Judge.

Cameron, Circuit Judge: This appeal presents the question whether the District Court was clearly erroneous in

its finding that defendant, in using the picture of a squirrel on its labels and advertising, did not infringe plaintiff's registered trademark and did not unfairly compete with plaintiff. Squirrel Brand Company, appellant, as plaintiff below, sued Barnard Nut Company, Inc., appellee, defendant below, demanding injunctive relief and damages for claimed infringement of its "Squirrel Brand" Trademark and for unfair competition in connection with the manufacture and sale in interstate commerce of nuts, nut meats and candies. The action was based upon the claim that plaintiff had the sole right to use the figure of a squirrel along with the word "Squirrel" and its own trade name on nuts, nut products and candies, and that defendant infringed its registered trademark by the use of the similar figure of a squirrel as a trademark on its competing products.

The District Court entered its Findings of Fact and Conclusions of Law,[1] finding that plaintiff was the owner

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[1] "1. The Court has jurisdiction of the parties and subject matter.

2. The plaintiff and cross-defendant is a corporation with principal offices in Cambridge, Massachusetts.

3. The defendant and cross-plaintiff is a corporation with principal offices in Miami, Florida.

4. Both parties are engaged in the processing and sale of nuts.

5. On January 8, 1889, Francis H. Leggett & Co. registered in the U. S. Patent Office a trade mark, which, in part, consisted of a picture of a squirrel and the words 'Squirrel Brand'. This trade mark was assigned to P. G. Gerrish, former president of plaintiff.

6. On December 21, 1909, the plaintiff registered in the U. S. Patent Office as a trade mark the words 'Squirrel Brand.' This registration was renewed to the plaintiff on December 21, 1949.

7. On October 5, 1915, Powells registered in the U. S. Patent Office a trade mark, which consisted, in part, of a picture of a squir-

of trademark registrations bearing the picture of a squirrel and the words "Squirrel Brand"; and that defendant likewise used the picture of a squirrel along with its name and catch phrase "Barnard's Nuttee Foods"; but that there would be no likelihood of confusion or mistake as to the source or origin of the goods produced by the respective parties; and that there was no infringement or un-

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rel and the words 'Squirrel Brand'. This trade mark was ultimately assigned to plaintiff.

8. On October 30, 1934, plaintiff registered in the U. S. Patent Office as a trade mark a picture of a squirrel.

9. Plaintiff has used such trade mark or marks in commerce in connection with the sale of its products since on or about the year 1888 and has expended large sums in advertising its products under such trade mark or marks.

10. On April [illegible]0, defendant registered in the Office of the Secretary of State of the State of Florida a trade mark which consisted, in part, of a picture of a squirrel and the words 'Barnards Nuttee Foods.'

11. The defendant has used such trade mark in the State of Florida since on or about the year 1934 and has advertised its products under such trade mark and its sales have been quite extensive over the southeastern area of Florida.

12. Plaintiff's products have been sold in Florida since on or about the year 1935. Its sales have not been extensive.

13. The plaintiff's labels have thereon, in a circle, in the middle of such labels, a picture of a squirrel, and in prominent letters immediately above such picture the word 'Squirrel' and in smaller letters the word 'Brand'.

14. The defendant's labels have thereon, in a circle, at the top of such labels, a picture of a squirrel, and in prominent letters running from the side of such label into said circle the word 'Barnards.' On the opposite side of the label are the words 'Nuttee Foods.'

15. The color make-up of plaintiff's and defendant's labels are not similar.

16. Upon inspection of the labels of plaintiff and defendant, the producer of the particular product clearly appears thereon.

fair competition. The Court further found that defendant had advertised and sold its products in Florida prior to plaintiff's beginning business there. From the judgment entered for the defendant upon those findings, plaintiff appeals.

Appellant claims that the findings of the court below are clearly erroneous and that the evidence plainly shows that the use by appellee of the figure of a squirrel is an undoubted infringement of appellant's trademark giving rise to the likelihood of confusion and mistake as to the source or origin of the respective products; that indis-

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17. On all products produced, plaintiff's and defendant's names appear prominently on the container.

18. There was no fraudulent intent on the part of defendant to appropriate to its use plaintiff's trade mark. Defendant at the time of the adoption of its trade mark had no knowledge of plaintiff's trade mark.

19. After full consideration of all of the testimony and inspection of the various labels on plaintiff's and defendant's products, and of all exhibits, the Court finds that there will be no confusion or mistake or likelihood of confusion or mistake as to the source of origin of the goods produced by the parties.

Conclusions of Law:

1. There is 'infringement of trade mark' only if words or designs used are identical with or so similar to the alleged infringed trade mark that confusion or mistake or likelihood of confusion or mistakes as to the source of origin of the goods would result.

2. Defendant's labels or marks are not an infringement of plaintiff's trade mark.

3. Plaintiff's labels or marks are not an infringement of defendant's trade mark.

4. A final decree should be entered dismissing plaintiff's complaint and dismissing defendant's cross-complaint.

5. Each party shall pay its own costs.

Dated at Miami, Florida, this 29th day of October, 1953."

putable documentary evidence required a finding as against purely oral testimony that appellee was not using its trademark in Florida prior to the beginning of appellant's business there. Appellant further refutes vigorously appellee's claim that the use of the figure of the squirrel was merely descriptive and not the proper subject of trademark registration.

A clear-cut issue of fact was developed in the court below with respect to each of the issues framed by the contentions of the parties. The case was tried by the same experienced judge who tried *Pure Foods v. Minute Maid Corp., infra,* so much relied upon by appellant; the hearing was a long one, both sides introducing many depositions and many witnesses to testify orally, and the exhibits totaled more than one hundred. At the conclusion of the hearing the court below entered its findings and conclusions, as set out above, and these must stand unless we can say that they were clearly erroneous. That we are not warranted in doing under the evidence before us.[2]

We have examined the documentary evidence, the testimony of the witnesses who gave their depositions and have compared and contrasted the oral testimony of the witnesses, ascribing to each kind of evidence the weight and merit according to standards clearly recognized in this

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[2] "Under the circumstances of each case, it depends on whether 'the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed' [Citing cases]. The burden is especially strong when the trial court has had the opportunity, not possessed by the appellate court, to see and hear the witnesses, to observe their demeanor on the stand, and thereby the better to judge of their credibility [Citing cases]. The burden is lighter, much lighter, when we consider logical inferences drawn from undisputed facts or from documents, though the 'clearly erroneous' rule is still applicable." Galena Oaks Corp. v. Schofield, 5 Cir., 1954, 218 F. 2d 217, at 219. See also: Graver Mfg. Co. v. Linde Co., 1950, 339 U. S. 605; Parr v. Schofield, 5 Cir., 1950, 185 F. 2d 535; Wald v. Eagle Indemnity Co., 5 Cir., 1949, 178 F. 2d 91.

court,[3] and find that there is substantial credible evidence to support the court's finding in each instance, including the prior use of the squirrel image by appellee.

The field of trademark infringement and unfair competition has furnished a large body of litigation and the cases are almost without number. No good purpose will be served by trying to analyze them and to relate this case to those thought to bear a close resemblance to it. Both parties have done this in their briefs, and we have read the cases and have found none which is determinative of the questions here. Appellant cites many cases where injunctions have been granted and where findings have been made in favor of litigants claiming infringement. The trouble is that the court below found the facts here in favor of the appellee and against infringement. The court below did not render a written opinion, but it tried the case fairly and expertly and reached conclusions which we find to be quite consonant with the evidence before it.

It may be that the court below found it as difficult as we have to visualize as ubiquitous and peripatetic a creature as a squirrel, inured to the free life of a nomad, being leashed or hemmed in and made the subject of monopoly. Such an effort awakens mental reactions not unlike those which led this court to refuse to permit the word "Bama" to become the exclusive property of one manufacturer.[4] It is noteworthy in that connection that appellant urges, as its basic position, that it has so pre-

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[3] Shepherd v. Mahanna, 5 Cir., 1955, 220 F. 2d 737; Galena Oaks Corp. v. Schofield, supra; Chappell v. Goltsman, 5 Cir., 1953, 197 F. 2d 837.

[4] Chappell v. Goltsman, M. D. Ala., 1950, 88 F. Supp. 784, reversed, 5 Cir. 1950, 186 F. 2d 215; Chappell v. Goltsman, M. D. Ala., 1951, 99 F. Supp. 970, affirmed and modified, 5 Cir., 1952, 197 F. 2d 837.

empted the field with its trademark that it can prevent any person from using any squirrel in any position in any portion of its printed matter in connection with any products which are competitive with appellants.

This contention fails to grasp that, fundamentally, deception, actual or probable, is the essence of an action for infringement or unfair competition.[5] The test is whether there is a probability that the average person will be so confused by the use of the device complained of as to believe that the products offered by the infringer were produced by the trademark owner,—that there is likelihood that prospective purchasers will be misled to appellant's damage.[6] The application of these tests to the facts before us do not lead to the conclusion that appellee was using a colorable imitation of appellant's trademark so as to bring about confusion or deception on the part of the average prospective purchaser.

We begin with the finding of the court below, established by clear and convincing evidence, that there was no guilty knowledge on the part of appellee, no purpose or intent to deceive or to attempt to pass off its goods as being those of appellant. While guilty knowledge or fraudulent intent are not essential elements of infringement of a trademark,[7] they are entitled to considera-

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[5] Nebraska Consol. Mills Co. v. Shawnee Milling Co., 10 Cir., 1952, 198 F. 2d 36; Benrose Fabrics Corp. v. Rosenstein, 7 Cir., 1950, 183 F. 2d 355; Speed Products Co. v. Tinnerman Products, 2 Cir., 1940, 179 F. 2d 778; General Finance Loan Co. v. General Loan Co., 8 Cir., 1947, 163 F. 2d 709.

[6] McLean v. Fleming, 1877, 96 U. S. 245, at p. 251; Telechron, Inc., v. Telicon Corp., 3 Cir., 1952, 198 F. 2d 903; LaTouraine Coffee Co. v. Lorraine Coffee Co., 2 Cir., 1946, 157 F. 2d 115; Avrick v. Rockmont Envelope Co., 10 Cir., 1946, 155 F. 2d 568; Coca-Cola Co. v. Carlisle Bottling Works, 6 Cir., 1930, 43 F. 2d 119.

[7] Thaddeus Davids Co. v. Davids Mfg. Co., 1914, 233 U. S. 461; Telechron, Inc., v. Telicon Corp., *supra;* Tyree Chemist v. Thymo Borine Laboratory, 7 Cir., 1945, 151 F. 2d 621.

tion.[8] Also, appellee has never used the *name* "Squirrel," so that there is no confusion of names with appellant's. Moreover, appellee has universally used its own name, projecting it into the circular background framing the squirrel image, and has stressed prominently its own coined phrase "Nuttee Foods."

The ordinary purchaser, buying under usual conditions and exercising the normal care used in such activities, would, upon looking at appellant's wares, be challenged by the words "Squirrel Brand" in bold letters and constituting the most conspicuous portion of appellant's label. The same purchaser, looking upon appellee's products, would normally find the words "Barnards Nuttee Foods" as constituting the heart of appellee's descriptive matter. The only thing common to both is the picture of a squirrel. The pictures used do not bear a marked similarity. Naturally both show the squirrel sitting, as squirrels have always of necessity sat, on its haunches with the nut in its forepaws. The court below held, and we agree, that the likelihood of confusion or deception is not present. We are unwilling to hold that, under the facts in this case, appellee cannot make use of the image of the cunning and engaging little vagrant so universally associated in the public mind with nuts.

While the court below did not make a finding with regard to whether the figure of a squirrel was common property by reason of being merely descriptive of appellee's business as a dealer in nuts and nut products, the parties argue this question vigorously here. Appellant argues that its adoption of the squirrel figure and the squirrel name represented a purely fanciful and arbitrary choice; while

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[8] United Drug Co. v. Obear-Nester Glass Co., 8 Cir., 1940, 111 F. 2d 997; Broderick & Bascom Rope Co. v. Manoff, 6 Cir., 1930, 41 F. 2d 353.

appellee contends that the squirrel as a symbol is reasonably indicative and descriptive of the nut business, and that a squirrel conveys to the public the instinctive impression and signification of nuts, and that this connotation or association is natural and universal.[9] It is not necessary to go into a technical consideration of the exact meaning of the word "descriptive," as applied to this phase of infringement suits, but it is clear that, as related to the facts of this case, appellee's argument is much more convincing than that of appellant.

What we have said rejects also the idea of any secondary meaning as contended for by appellant as inhering in its trademark. Certainly the use of the name and the figure of the squirrel do not tend to bring to the public mind, not the product primarily but the producer,—a test frequently applied in considering whether there is secondary meaning.[10]

Nothing said here is out of harmony with the decisions of this court[11] urged upon us by appellant. This case and those cases all involved questions of fact to be determined by the attending circumstances of each case.[12] The court below gave close and painstaking consideration to the facts as they unfolded before it, and we have reviewed

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[9] "'* * * no one can appropriate as a trade-mark a generic name or one descriptive of an article of trade, its qualities, ingredients or characteristics, or any sign, word or symbol which from the nature of fact it is used to signify others may employ with equal truth.'" Standard Paint Co. v. Trinidad Asphalt Co., 1911, 220 U. S. 446, at 453.

[10] Cf. Kellogg Co. v. National Biscuit Co., 1938, 305 U. S. 111.

[11] Pure Foods, Inc., v. Minute Maid Corp., 5 Cir., 1954, 214 F. 2d 792; John Walker & Sons v. Tampa Cigar Co., 5 Cir., 1952, 197 F. 2d 72; Tampa Cigar Co. v. John Walker & Sons, 5 Cir., 1955, 222 F. 2d 460; Bulova Watch Co. v. Steele, 5 Cir., 1952, 194 F. 2d 567.

[12] Ib. and Chappell v. Goltsman, 5 Cir., 1952, 197 F. 2d 837.

them carefully. We agree with the conclusions reached by the District Court and the judgment is, therefore,

Affirmed.

A True Copy:

Teste:

John A. Feehan, Jr.,
Clerk,

By Clara R. James,
Deputy Clerk of the United States Court of Appeals for the Fifth Circuit.

(Seal)

TRADE-MARK.

THE SQUIRREL BRAND COMPANY.

CERTAIN FOODS.

APPLICATION FILED FEB. 7, 1907.

76,187.

Registered Dec. 21, 1909.

SQUIRREL BRAND

Proprietor.

The Squirrel Brand Company

by Macleod, Calver, Copeland & Dike.

Attorneys.

Republished, under the Act of 1946, Aug. 3, 1948, by
The Squirrel Brand Co., Cambridge, Mass.

Re-renewed Dec. 21, 1949, to The Squirrel Brand Co.,
Cambridge, Mass.

Renewed to
Squirrel Brand Co., a corporation of Massachusetts.

UNITED STATES PATENT OFFICE.

THE SQUIRREL BRAND COMPANY, OF CAMBRIDGE, MASSACHUSETTS.

TRADE-MARK FOR CERTAIN FOODS.

76,187. Statement and Declaration. **Registered Dec. 21, 1909.**

Application filed February 7, 1907. Serial No. 25,189.

STATEMENT.

To all whom it may concern:

Be it known that we, THE SQUIRREL BRAND COMPANY, a firm domiciled in Cambridge, county of Middlesex, and Commonwealth of Massachusetts, doing business at Nos. 620–624 Main street, in said city, and composed of the following members, FRED S. GREEN and PERLEY G. GERRISH, citizens of the United States of America, have adopted for our use the trade-mark shown in the accompanying drawing, for cracked nuts, nut-meats, and salted nuts, peanut-butter and peanut-bars, fruit and nut fudge, fruit-squares, peanut-squares, nut-caramels, nut confections, nut-kisses, peanut-wafers, walnut-wafers, and peanut-taffy, in Class 46, Foods and ingredients of foods.

The trade-mark has been continuously used in our business and in the business of our predecessors since November 1, 1888.

The trade-mark is displayed on the packages containing the goods by placing thereon a printed label on which the trade-mark is shown.

THE SQUIRREL BRAND COMPANY,
By PERLEY G GERRISH,
A member of the firm.

DECLARATION.

State of Massachusetts county of Suffolk ss.

PERLEY G. GERRISH, being duly sworn deposes and says that he is a member of the firm, the applicant named in the foregoing statement; that he believes the foregoing statement is true; that he believes said firm is the owner of the trade mark sought to be registered; that no other person, firm, corporation or association, to the best of his knowledge and belief has the right to use said trade mark, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that said trade mark is used by the said firm in commerce among the several States of the United States; that the drawing presented truly represents the mark sought to be registered; that the specimens show the mark as actually used upon the goods; and that the mark has been in actual use as a trade mark of the applicant, and applicant's predecessors from whom title was derived for ten years next preceding the passage of the act of February, 1905, and that to the best of his knowledge and belief such use has been exclusive.

PERLEY G. GERRISH.

Subscribed and sworn to before me this 19th day of March 1909.

[L. S.] ALICE H. MORRISON,
Special Commissioner.

Registered Oct. 30, 1934

Trade-Mark 318,545

Republished, under the Act of 1946, July 27, 1948, by
The Squirrel Brand Co., Cambridge, Mass.

UNITED STATES PATENT OFFICE

Squirrel Brand Co., Cambridge, Mass.

Act of February 20, 1905

Application June 2, 1934, Serial No. 352,201

STATEMENT

To the Commissioner of Patents:

The Squirrel Brand Co., a corporation duly organized under the laws of the Commonwealth of Massachusetts, located in the city of Cambridge, county of Middlesex, and said Commonwealth, doing business at 10 Boardman Street, Cambridge, Massachusetts, has adopted and used the trade-mark shown in the accompanying drawing, for PEANUTS, SALTED PEANUTS, SALTED PECANS AND SALTED MIXED NUTS, NUT CANDIES, NUT CARAMELS, PEANUT BARS, PEANUT TAFFY, STUFFED DATES, BUTTER SCOTCH NUT CANDY, AND PEANUT BUTTER, in Class 46, Foods and ingredients of foods, and presents herewith five specimens showing the trade-mark as actually used by applicant upon the goods, and requests that the same be registered in the United States Patent Office in accordance with the act of February 20, 1905, as amended.

The trade-mark has been continuously used and applied to said goods in applicant's business and that of its predecessor in title since November 1, 1888.

Applicant is the owner of Trade-Mark Nos. 16,159, January 6, 1889; 76,187, December 21, 1909, 106,081, October 5, 1915, and 165,781, March 20, 1923.

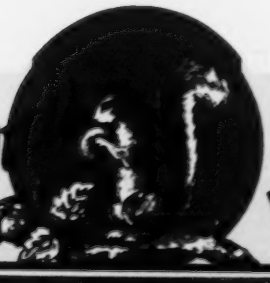
The trade-mark is displayed by being printed on the boxes and bags containing the goods, and on labels which are attached to the packages containing the goods.

SQUIRREL BRAND CO.,
By HOLLIS G. GERRISH,
Vice President.

SQUIRREL
BRAND

SALTED
MIXED NUTS
WITHOUT PEANUTS

ROASTED IN PURE VEGETABLE OIL AND SALTED.
CASHEWS — FILBERTS
ALMONDS — PECANS
BRAZILS WHEN ADDED.



VACUUM PACKED

BARNARD NUT COMPANY, INC., MIAMI, FLORIDA

APPENDIX D.

SQUIRREL
BRAND
REG. U.S. PAT. OFF.
SALTED
MIXED NUTS
WITHOUT PEANUTS
MIXED NUTS
BARNARD NUT COMPANY, INC.